

**A.M.F. Bowling Company, Inc. and United Steelworkers of America, AFL-CIO, CLC, District 4.** Cases 3-CA-13625, and 3-CA-13982

May 29, 1991

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND DEVANEY

On December 5, 1989, Administrative Law Judge Howard Edelman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party Union each filed cross-exceptions and supporting briefs. Additionally, the Respondent filed an answering brief to the respective cross-exceptions, and the General Counsel and the Charging Party Union each filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs<sup>1</sup> and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions as modified, to modify the remedy,<sup>3</sup> and

<sup>1</sup>The Charging Party Union filed a motion to strike certain portions of the Respondent's answering brief because they do not address arguments raised by the General Counsel and the Union in their respective cross-exceptions. The Respondent filed a response to the Union's motion. After reviewing the parties' submissions on this subject, we have decided to deny the Union's motion as lacking in merit.

<sup>2</sup>The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd, 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In adopting the judge's credibility findings, we correct below certain misstatements the judge made that we find are insufficient to affect our ultimate conclusions in this case. Other corrections of factual errors in the judge's decision are subsumed in the recitation of facts relevant to our finding that the Respondent bargained in bad faith over the subject of wages.

In summarizing the Respondent's bargaining proposals at the close of the afternoon and evening negotiating sessions held on January 8, 1987, the judge twice stated that the Respondent was continuing to insist on language proposals that would eliminate the Union's ability to grieve job-grading decisions. Further, in the fourth paragraph of his "Analysis and Conclusions," the judge stated that throughout the entire course of negotiations the Respondent proposed to eliminate decisions relating to job selection and job grading from the grievance procedure. It is clear from the record, however, that the Respondent dropped both of these proposals during the parties' negotiations on January 8.

Further, the judge stated in the sixth-to-last paragraph of his "Analysis and Conclusions" that the Respondent had orally declared a bargaining impasse on January 8. The record shows, however, that the Respondent declared impasse for the first time in the telegram it sent the Union on January 16.

<sup>3</sup>Based on the unlawful unilateral changes the Respondent made here, the judge ordered the Respondent to restore the terms and conditions of employment that were in effect before the Respondent declared a bargaining impasse. The Charging Party Union has filed a cross-exception regarding the judge's failure to include a requirement that the Respondent, in restoring the status quo ante, not reduce any increases in wages and benefits the unit employees may have received unless requested by the Union. We find merit in the Union's contention, and we have modified the judge's remedy accordingly.

Further, it is clear that the backpay and other benefits owed to the unit employees resulted from the Respondent's failure to apply the extended collective-bargaining agreement between the parties that expired on January 8, 1987.

to adopt the recommended Order as modified and set out in full below.

We find it unnecessary on the particular facts here to pass on the judge's finding that the Respondent generally engaged in surface bargaining during contract negotiations with the Union. For the reasons set forth below, we conclude, rather, that the Respondent violated Section 8(a)(5) of the Act by failing to provide the Union with the wage surveys it conducted to justify the necessity for the substantial economic reductions contained in its bargaining proposals. Because the Respondent's unlawful conduct prevented a valid bargaining impasse from occurring as the Respondent claimed, we adopt the judge's further findings that the Respondent also violated Section 8(a)(5) by withdrawing recognition from the Union, by making unilateral changes, by direct dealing with the unit employees, and by refusing to provide certain requested information to the Union.

We find additional 8(a)(5) violations, which are alleged in the complaint and which the judge did not specifically decide, in the Respondent's post-implementation letter refusing to bargain unless the Union's position has "altered dramatically" and in its chief negotiator's comment at the final bargaining session that the Union "had wasted his time" by pursuing further negotiations. We also conclude that the Respondent independently violated Section 8(a)(1) of the Act by precluding bargaining unit employees from participating in its severance plan. However, as discussed fully below, we do not find that the Respondent violated Section 8(a)(5) by insisting to impasse on its proposal that would enable nonunit employees to perform bargaining unit work without any limitation.

1. The record shows that on or about August 24, 1986,<sup>4</sup> the Respondent signed an agreement to purchase the bowling division of AMF, Inc. from Minstar. A condition of the purchase agreement was that the Respondent adopt all of Minstar's collective-bargaining agreements, including the contract with the Union covering about 75 production and maintenance employees at the Lowville, New York plant involved here. Minstar's domestic manufacturing division at that time consisted of the Lowville plant and another in Shelby, Ohio. During the summer of 1986, Minstar negotiated a new collective-bargaining agreement with another labor organization representing the employees at the Shelby plant that provided for reductions of 24 and 14 percent, respectively, in wages and benefits.

On September 24, the Union, which had enjoyed a stable bargaining relationship with the Respondent's predecessors for about 20 years, notified the Respond-

For this reason, we conclude that the amounts due the discriminatees should be computed in accordance with the Board's formula in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), rather than, as the judge found, under the formula stated in *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

<sup>4</sup>All dates are in late 1986 or 1987.

ent that it was terminating the existing contract that would expire on December 8. On October 1, the Respondent's chief negotiator, Jack Burtch, sent the Union a letter acknowledging the Union's termination letter and offering to meet with the Union on November 10. The Respondent subsequently closed the purchase of the business from Minstar on November 21.

The first bargaining session was held on December 3. With respect to the wage issue that was the pivotal subject during the parties' negotiations, the credited evidence discloses that the Union initially proposed a 2-year contract providing for an 8-percent wage increase each year. After the Union submitted this proposal, Burtch told the Union that the Respondent needed to be more competitive and would require economic concessions. Employee Daniel Ritz, the president of the local, replied that the Respondent would have to justify the need for economic concessions. Burtch, who presented no specific bargaining proposals that day, replied that the owners had not yet reviewed either the contract or the operation itself. The parties, at Burtch's request, then agreed to a 30-day extension of the contract until January 8.

At the second bargaining session on December 16, the Respondent made its initial economic proposals seeking reductions of 24 and 14 percent, respectively, in wages and benefits. The Respondent at that time sought to maintain the 10 job classifications that unit employees held at the Lowville plant. The Respondent's wage proposal would have resulted in a weighted average of \$6.86 per hour for the unit employees as compared to the existing \$9.04 hourly average. When Ritz asked Burtch why such extensive cuts were necessary, Burtch said that the Respondent needed the concessions to remain competitive. Ritz again demanded justification for the Respondent's position, but Burtch merely restated his initial proposal. Ritz then counterproposed that the Union would reduce its wage proposal from an 8-percent increase the first year to a 6-percent raise. When Burtch did not respond, Ritz asked him what kind of wage rates the Respondent ultimately was seeking. Burtch again failed to respond. Burtch also did not respond to Ritz' suggestion that the Respondent consider implementing a profit-sharing plan so that the employees, if the Respondent had a profitable year, could recoup any earnings they lost by agreeing to lower wages.

Thereafter, on December 23, the Respondent's owner, Frank Genovese, told General Manager Rodney Mallette to review the entire Lowville operation and prepare new job classifications and accompanying wage rates for the unit employees. Mallette devised a unit structure with 16 job classifications and prepared a wage proposal with a weighted average of \$6.72 per hour, which constituted a 26-percent reduction from existing wage rates.

During the third bargaining session held on January 6, the Respondent made its initial noneconomic bargaining proposals. The Respondent did not yet inform the Union about the new wage and job classification structure that Mallette had prepared.

On January 7, the parties met again with a Federal mediator present. Burtch gave the Union Mallette's proposal in which the Respondent sought to reduce the employees' existing wages by 26 percent and to increase the number of their job classifications from 10 to 16 percent. When the parties discussed this proposal, Ritz stated that the new offer was even less than the December 16 proposal. Burtch insisted that they were the same.<sup>5</sup> Ritz then proposed a bifurcated wage structure in which the Respondent would freeze wages for present employees during the first year and give them a 3-percent raise the second year; the Respondent could then apply its proposed wage reductions to new hires. Burtch did not respond to the Union's offer. After the parties caucused and reconvened, Burtch handed the Union a revised job classification structure consisting of 10 job grades.

However, it was not until the parties next met on June 8 that the Respondent gave the Union the wage rates corresponding to its January 7 job classification proposal. This offer again had a weighted average of \$6.72 per hour. After Ritz stated that the Union would agree to the Respondent's proposed reductions in fringe benefits in exchange for a wage freeze the first year, Burtch replied that the Union was not addressing the Respondent's need for a wage cut. Ritz requested the Respondent to supply the Union with substantiation or documentation as to why such a huge wage cut was necessary. Although the Union made this request at every meeting where the parties discussed the Respondent's demand for a wage cut, the Respondent never furnished the Union with any such information. That afternoon the Respondent presented the Union with a 2-year wage proposal with a weighted average of \$7.10 per hour that amounted to a 22-percent reduction from existing wages. The unit employees unanimously rejected the Respondent's latest contract offer in a ratification vote held the same evening.

When the parties met on January 14, Burtch gave the Union a new wage offer with a weighted average

<sup>5</sup> Although the Respondent claimed that this proposal was essentially the same as its December 16 proposal to reduce employees' wages by 24 percent, the judge found that the Respondent actually was seeking additional cuts at this time and that, therefore, the January 7 wage offer was regressive. It appears from the record that the determinative of whether the Respondent was proposing a wage reduction of 24 or 26 percent on January 7 turns on the number of unit employees that the Respondent employed on that date. The evidence on this point is not entirely clear. Nevertheless, based on Mallette's testimony that the weighted average of the Respondent's January 7 bargaining proposal was \$6.72 per hour, we agree with the judge that this wage demand was regressive when compared to the Respondent's earlier December 16 proposal which had a weighted hourly average of \$6.86. However, as discussed below, this finding is not critical to our ultimate conclusion that the Respondent bargained in bad faith on this subject.

of \$7.25 per hour. The parties again met on January 15, but neither party submitted any new proposals. Burtch said that the Union had failed to move when he presented the Respondent's final proposals the previous day. Burtch then asked the Union whether there was "any concession we can make" on noneconomic subjects.<sup>6</sup> The Union did not seek to identify precisely those noneconomic concessions, if any, the Respondent was willing to make.

Thereafter, the Respondent declared an impasse and, on January 21, it unilaterally implemented the wage and benefit proposals in its January 14 offer. On January 27, the parties held another negotiating session at which the Union made some concessions, while Burtch continued to insist that the parties were at impasse. On March 4, the Union sent the Respondent a letter requesting further bargaining. Burtch replied by letter, dated March 4, in which he reiterated that the parties were at impasse and also stated that further meetings would be futile "unless the Union's position has altered dramatically."

Nevertheless, the Federal mediator arranged another meeting for April 30. The Union told the Respondent that it would agree to a 10-percent wage reduction for the first year of the contract, but wanted raises of 3 and 4 percent, respectively, during the second and third years. The Union also proposed development of a profit-sharing plan. Despite the concessions the Union had made, Burtch insisted on the Respondent's January 14 wage proposals and claimed that the Union had "wasted his time" during this bargaining session.

On May 17, the Respondent informed the Union and the unit employees that it was unilaterally changing these employees' vacation accrual system to conform to that provided salaried employees. On May 28, the Respondent withdrew recognition from the Union based on a petition signed by 69 employees, the vast majority of the unit, stating that they no longer desired union representation. During the next few months, the Respondent fully implemented the policies contained in its salaried employees' personnel manual, instituted a new grievance procedure, established a profit-sharing plan and a system of production bonuses, and created a merit review program.

On August 6, the Union made a written request for the Respondent's records concerning the amount and manner of contributions for the unit employees' new pension plan and information about how the Respondent established the plan. The Respondent, as the judge

found, did not fully respond to the Union's information request.

It is clear that throughout the negotiations the Respondent was insisting that the Union accept significant wage and benefit reductions for the unit employees. Applying the principles set forth in *Reichhold Chemicals*, 288 NLRB 69 (1988), enfd. in relevant part sub nom. *Teamsters Local 515 v. NLRB*, 906 F.2d 719 (D.C. Cir. 1990), we will not scrutinize the Respondent's bargaining proposals to see if they are sufficiently generous in the circumstances here. We will address, however, the issue of whether the Respondent was required to provide the Union with substantiation for the necessity of the economic reductions the Respondent sought.

We stress that during the negotiations in this case the Union repeatedly asked the Respondent to justify the severe cuts in wages and benefits that the Respondent was seeking. The Respondent, according to the credited evidence, frequently only generally responded that it needed the cuts to remain competitive, and on some occasions did not respond at all to the Union's concerns. On other occasions, however, according to the credited testimony of Union President Ritz, the Respondent explained to the Union that past wage increases at Lowville had exceeded increases in the cost of living, and that the existing wage levels were in excess of the wage rates necessary to attract and retain competent employees in the Lowville job market. In this regard, the record establishes that the Respondent conducted a survey comparing the wage rates of its employees to those of other employees performing similar work, and that this information was shown by the Respondent's president, Genovese, to the Respondent's negotiator, Mallette, in support of the Respondent's negotiating position. Given the data collected by the Respondent and the evidence that another union had accepted similar cuts at the Respondent's sister plant in Shelby, Ohio, the Respondent may have been entirely justified in seeking wage and benefit cuts during the contract negotiations.

We recognize, however, that this is not the real question here. Rather, based on the Union's continuing request for substantiation and documentation regarding the Respondent's economic proposals, it is clear that the Respondent had an obligation to furnish that information in its possession which was relevant to and supportive of the Respondent's asserted need for concessions. We emphasize, in this regard, that the Board has consistently required employers to provide any wage surveys on which they have relied in the formulation of their bargaining proposals when the Union requests such information.<sup>7</sup> The record establishes that the Respondent conducted surveys comparing Lowville wage rates to increases in the cost of living, and in-

<sup>6</sup> Although the judge discredited Burtch's testimony that he made this statement on June 15, it is clear from the record that Ritz, the General Counsel's witness, admitted in his testimony that Burtch had offered to make unspecified concessions on noneconomic subjects during this meeting. Thus, we are satisfied from the record that Burtch actually made this vague proposal at the June 15 meeting. Contrary to the Respondent's argument, however, we do not find that our reversal of the judge's credibility resolutions on this point alone has any effect on our finding, *infra*, that the Respondent bargained in bad faith over wages.

<sup>7</sup> See, e.g., *Mobil Exploration & Production U.S.*, 295 NLRB 1179 (1989).

creases received by employees performing similar work, and relied on those surveys in formulating economic proposals based on its conclusion that Lowville wages and benefits were too high. Yet the Respondent never disclosed to the Union that it had such data in its possession. Further, when the Union requested any substantiation or documentation for the Respondent's economic proposals, the Respondent failed to provide this information. Although this case does not present the issue raised in the inability to pay cases, the Supreme Court's observation in *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–153 (1956), is applicable:

Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims . . . . If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.

Thus, the Respondent has obstructed the bargaining process by making bargaining demands certain to ensure difficult negotiations and then concealing from the Union information which at least in part constituted the basis for the Respondent's proposals.<sup>8</sup>

Because the Respondent failed to bargain in good faith, we find that the parties did not reach a valid impasse in mid-January as the Respondent claimed.<sup>9</sup> Therefore, we adopt the judge's findings that the Respondent further violated Section 8(a)(5) by making unilateral changes,<sup>10</sup> by withdrawing recognition from the Union,<sup>11</sup> by dealing directly with the unit employees,<sup>12</sup> and by refusing to provide information on pension plans to the Union.<sup>13</sup>

Following its bad-faith bargaining on the subject of wages, the Respondent, as noted, wrote the Union a letter on March 16 refusing to bargain further unless the Union "altered dramatically" its bargaining proposals. Here, we have rejected the Respondent's contention that the parties reached a valid bargaining impasse in mid-January. In the absence of a valid impasse, the Respondent could not legitimately precondition further negotiations on the Union's willingness to alter its bargaining stance.<sup>14</sup> Accordingly, we find that the Respondent also has violated Section 8(a)(5) of the Act by its March 16 letter establishing bargaining conditions. We further conclude that the

Respondent continued to demonstrate bad faith at the final negotiating session on April 30 when its chief negotiator, Burtch, complained that the Union "had wasted his time" by arranging the meeting. Although it is evident that remarks of this kind could never serve to assist the parties in reaching agreement, we believe there is sufficient evidence in this case to warrant a finding that Burtch's conduct was specifically designed to frustrate bargaining and prevent agreement in violation of Section 8(a)(5). In so concluding, we stress our findings above that before this meeting the Respondent had bargained in bad faith on wages and then unlawfully conditioned further negotiations on the Union making bargaining concessions, and the evidence that at the April 30 meeting where the Respondent's chief negotiator claimed that the Union was wasting his time the Union, in fact, had made significant wage concessions. Contrary to our dissenting colleague, we do not find that Burtch's remarks constituted harmless "bluster and banter" in the context of this case where the Respondent previously had engaged in bad-faith bargaining during the parties' contract negotiations. For this reason, the cases that the dissent relies on to support its position are inapposite.<sup>15</sup>

2. After withdrawing recognition from the Union, the Respondent, on June 23, began applying the personnel policies and procedures that covered non-bargaining unit employees to the members of the unit the Union represented. The Respondent's manual provided, inter alia, for a severance plan in which "[a]ny employee is eligible for a severance allowance if he/she is involuntarily terminated by the Company, unless he/she: . . . 2. Is a member of a bargaining unit."

We agree with the General Counsel's and the Union's contentions that the Respondent unlawfully excluded bargaining unit employees from participating in its severance plan. In *Niagara Wires*, 240 NLRB 1326 (1979), the Board found that the maintenance of an employee benefit plan that restricted coverage to unrepresented employees violated Section 8(a)(1) because it conveyed to employees the impression that they would lose the benefit if they ever chose union representation. The severance plan provided for in the Respondent's policies and procedures manual clearly conveys that impression. There is no evidence in the record to suggest that severance benefits were ever discussed in negotiations with the Union, or that the Respondent considered them a subject for bargaining. Nor does the record indicate that the severance benefits set

<sup>8</sup>In this regard, the Respondent's argument that the Union never specifically requested the wage surveys is disingenuous. The Respondent cannot argue that it had no obligation to provide the surveys because of the failure of a specific request, when it at the same time had failed to disclose their existence to the Union.

<sup>9</sup>*Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), petition for review denied sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

<sup>10</sup>*Quality Engineered Products*, 267 NLRB 593, 597 (1983).

<sup>11</sup>*Engineered Control Systems*, 274 NLRB 1308 at fn. 1 (1985).

<sup>12</sup>*Chester Valley, Inc.*, 251 NLRB 1455 (1980).

<sup>13</sup>*Vore Cinema Corp.*, 254 NLRB 1288, 1292 (1981).

<sup>14</sup>See *Harowe Servo Controls*, 250 NLRB 958, 961 (1980).

<sup>15</sup>Member Cracraft dissents from the finding that the Respondent violated Sec. 8(a)(5) when its chief negotiator told the Union that it had wasted his time by arranging further negotiations. In Member Cracraft's view this is an example of the "bluster and banter of negotiations" which does not evidence bad-faith bargaining. *Allbritton Communications*, 271 NLRB 201, 206 (1984), enf'd. 766 F.2d 812 (3d Cir. 1985), cert. denied 474 U.S. 1081 (1986). See *Sage Development Co.*, 301 NLRB 1173–1174 (1991); 88 *Transit Lines*, 300 NLRB 177 (1990).

forth in the Respondent's manual codified a historical practice of excluding unit employees.<sup>16</sup> Thus, there is nothing in the record that might dispel the message that the loss of severance benefits was the necessary result of choosing union representation.<sup>17</sup>

Accordingly, we find that the Respondent has violated Section 8(a)(1) of the Act by maintaining and continuing to maintain a severance plan limited to non-bargaining unit employees.

3. Finally, as part of its noneconomic proposals, the Respondent sought a provision allowing nonbargaining unit personnel to perform unit work. The parties' expired collective-bargaining agreement, as the judge noted, permitted the Respondent to assign unit work in this manner only under five enumerated circumstances set forth there.<sup>18</sup> During the most recent negotiations, however, the Respondent demanded that nonunit employees have the ability to perform unit work without limitation. The evidence shows that the Respondent insisted on this provision throughout the negotiations and that the Union's negotiators considered it a major obstacle, aside from wages, to reaching an agreement.

The judge found that by insisting to impasse on this proposal the Respondent was in effect attempting to alter the description of the bargaining unit. Although the judge concluded, citing *Standard Register Co.*, 288 NLRB 1409, 1410 (1988), that the Respondent's conduct in this regard constituted a "*per se*" violation of the Act, he did not make a specific finding that this was an 8(a)(5) violation. Both the General Counsel and the Union urge the Board to find the violation as alleged in the amended complaint.

Contrary to the judge, we do not find that the Respondent was seeking to change the unit scope in violation of the Act by insisting on retaining the discretion to remove work from the bargaining unit. We note that, consistent with the Board's prior certification of the Union, the expired collective-bargaining agreement defined the unit as "all hourly paid plant production

and maintenance employees . . . ." It is undisputed that the Respondent did not seek to change the unit description during its contract negotiations with the Union. In the absence of evidence showing that the Respondent proposed deleting certain job classifications or job functions from the established bargaining unit, we find that the Respondent was simply asserting its right to control the assignment of unit work at its facility. We therefore conclude that the present case is distinguishable from *Standard Register Co.*, supra, in which the Board found that the employer had bargained to impasse over the unit description and not work jurisdiction alone.

Further, it is well established that the removal of work from the bargaining unit, whether by contracting out or by transfer to nonunit employees, imposes on an employer the statutory duty to afford its employees' authorized bargaining representative the opportunity to bargain over the proposed change in operations.<sup>19</sup>

As the Seventh Circuit Court of Appeals stated in *University of Chicago v. NLRB*, 514 F.2d 942, 949 (1975):

[U]nless transfers are specifically prohibited by the bargaining agreement, an employer is free to transfer work out of the bargaining unit if: "(1) the employer complies with *Fibreboard Paper Products v. N.L.R.B.*, 379 U.S. 203 . . . by bargaining in good faith to impasse; and (2) the employer is not motivated by anti-union animus. *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263 [1965].

Thus, we find that the Respondent's proposal concerning work assignments was a mandatory subject of bargaining which the Respondent, if it had otherwise bargained in good faith, could have lawfully insisted on to impasse. For this reason, we find that the Respondent did not, as alleged, violate the Act by its insistence on controlling the assignment of unit work. Accordingly, we shall dismiss this allegation of the complaint.

#### AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusion of Law 4 and renumber the subsequent paragraph accordingly.

"4. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by maintaining those portions of the employee manual that indicate that employees who are members of bargaining units are automatically excluded from the Respondent's severance benefits plan. "5. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) of the Act by: (a) failing to provide

<sup>16</sup>In this regard, we find this case factually distinguishable from our decisions in *KEZI, Inc.*, 300 NLRB 594 (1990); *Fabric Warehouse*, 294 NLRB 189-192 (1989); *Lynn-Edwards Corp.*, 290 NLRB 202 (1988); *A. H. Belo Corp.*, 285 NLRB 807, 808-809 (1987); and *Handleman Co.*, 283 NLRB 451, 452 (1987).

<sup>17</sup>We find no merit to the Respondent's contention that, because unit employees actually received severance benefits, no violation should be found. It is clear that the Respondent extended those benefits only because it had withdrawn recognition from the Union, and thus that it considered the employees in question to be *former* unit employees. As the Respondent's withdrawal of recognition was unlawful, however, this defense must fail. Indeed, by extending severance benefits to employees on this basis, the Respondent simply underscored the message that benefits were to be had as a result of rejecting union representation. Nor is the Respondent's conduct redeemed by the fact that Mallette may have inadvertently failed to edit the offending language out of the manual. Such language, even if inaccurate, is nonetheless unlawful. See, e.g., *Lynn-Edwards Corp.*, supra at 204-205.

<sup>18</sup>Under that contract, nonbargaining unit personnel could perform unit work only to experiment with new equipment or new methods of performing operations; to train employees; to assist where machinery malfunctions occur; to manufacture and assemble prototype and experimental models; and to perform unit work when there is excessive absenteeism.

<sup>19</sup>See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964); *Weltronic Co. v. NLRB*, 419 F.2d 1120 (6th Cir. 1969); and *Stone & Thomas*, 221 NLRB 573 (1975).

the Union with wage surveys it conducted to justify the necessity for the substantial economic reductions contained in its bargaining proposals; (b) making unilateral changes in its employees' terms and conditions of employment; (c) refusing to bargain with the Union unless there was a dramatic alteration in the Union's bargaining proposals; (d) accusing the Union of wasting its time during contract negotiations; (e) withdrawing recognition from the Union; (f) encouraging and forming employee grievance committees; and (g) failing to supply the Union with information regarding the employees' pension plan."

### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, A.M.F. Bowling Company, Inc., Lowville, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

#### 1. Cease and desist from

(a) Failing to provide the Union with wage surveys it conducted to justify the necessity for the substantial economic reductions contained in its economic bargaining proposals.

(b) Withdrawing recognition from the Union as the exclusive collective-bargaining representative for employees in the unit described below.

(c) Refusing to meet and bargain with the Union until the Union dramatically altered its bargaining proposals.

(d) Accusing the Union of wasting its time during contract negotiations.

(e) Unilaterally instituting wage reductions for its employees and changing their pension, health, insurance plans and other benefits.

(f) Encouraging employees to bypass the Union by forming and assisting employee grievance committees.

(g) Failing, on request, to furnish the Union with pension plan information regarding the terms and provisions of the plan and contributions made on the unit employees' behalf.

(h) Maintaining portions of its employee manual that indicate that employees who are members of bargaining units are automatically excluded from its severance benefits plan.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

#### 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the unit described below with respect to rates of pay, wages, hours of employment, and conditions of employment, and, if an

agreement is reached, embody such understanding in a written, signed agreement.

All hourly paid plant production and maintenance employees including janitors at the Respondent's plants located at Trinity Avenue, South State Street and Utica Blvd., all in Lowville, New York; excluding office and clerical employees, technicians, guards (firemen-watchmen), foremen and all other supervisors as defined in the Act.

(b) Restore and place in effect all terms and conditions of employment provided by the contract that expired on January 8, 1987, which were unilaterally changed by the Respondent, except in those cases in which the Union may request that a particular change not be revoked.

(c) Make whole the unit employees for any loss of wages or other benefits they may have suffered by the implementation of its January 14, 1987 contract proposals or by the unilateral changes it made following its withdrawal of recognition from the Union in accordance with the remedy section of the judge's decision.

(d) Make contributions to any fund established by the parties' collective-bargaining agreement with the Union, which was in existence as of January 8, 1987, and which would have been paid but for its unlawful unilateral changes in the manner described in the remedy section of the judge's decision.

(e) On request, furnish the Union with any information, including but not limited to wage surveys, used by its collective-bargaining representatives to formulate contract proposals relating to negotiations with the Union.

(f) On request, furnish the Union with pension plan information regarding the terms and provisions of the plan and the contributions made to the plan on the unit employees' behalf.

(g) Eliminate from its employee manual any language that indicates that employees who are members of bargaining units are automatically excluded from participation in its severance benefits plan.

(h) Post at its Lowville, New York facility copies of the attached notice marked "Appendix."<sup>20</sup> Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Re-

<sup>20</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

spondent to ensure that the notices are not altered, defaced, or covered by any other material.

(i) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not found here.

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT, on request, fail to provide United Steelworkers of America, AFL-CIO, CLC, District 4 with wage surveys we conducted to justify the necessity for the substantial wage and benefit reductions contained in our economic bargaining proposals.

WE WILL NOT withdraw recognition from the Union as the exclusive collective-bargaining representative of employees in the unit described below.

WE WILL NOT refuse to meet and bargain with the Union until the Union has dramatically altered its bargaining proposals.

WE WILL NOT accuse the Union of wasting our time during collective-bargaining negotiations.

WE WILL NOT unilaterally institute wage reductions for our employees or change their pension, health, insurance plans, and other benefits.

WE WILL NOT encourage our employees to bypass the Union by forming and assisting employee grievance committees.

WE WILL NOT, on request, fail to furnish the Union with pension plan information regarding the terms and provisions of the plan and contributions made on the unit employees' behalf.

WE WILL NOT maintain portions of our employee manual that indicate that our severance benefits plan automatically excludes employees who are members of bargaining units.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the unit described below with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody that understanding in a written, signed agreement. The bargaining unit is:

All hourly paid plant production and maintenance employees including janitors at the our plants located at Trinity Avenue, South State Street and Utica Blvd., all in Lowville, New York; excluding office and clerical employees, technicians, guards (firemen-watchmen), foremen and all other supervisors as defined in the Act.

WE WILL restore and place in effect all terms and conditions of employment provided by the contract that expired on January 8, 1987, which we unilaterally changed, except in such cases in which the Union may request that a particular change not be revoked.

WE WILL make whole the unit employees for any loss of wages or other benefits they suffered by the implementation of our January 14, 1987 contract proposals or by the unilateral changes we made following our withdrawal of recognition from the Union.

WE WILL make contributions to any fund established by our collective-bargaining agreement with the Union which was in existence as of January 8, 1987, and which would have been paid but for the unlawful unilateral changes we made.

WE WILL, on request, furnish the Union with information, including but not limited to wage surveys, used by our collective-bargaining representatives to formulate contract proposals relating to negotiations with the Union.

WE WILL, on request, furnish the Union with pension plan information regarding the terms and provisions of the plan and the contributions made to the plan on the unit employees' behalf.

WE WILL eliminate from our employee manual language indicating that employees who are members of bargaining units are automatically excluded from participation in our severance benefits plan.

### A.M.F. BOWLING COMPANY, INC.

*Doren G. Goldstone, Esq.*, for the General Counsel.

*R. Daniel Bordani, Esq. and Raymond Poscucci, Esq. (Bond, Schoneck & King)*, for the Respondent.

*James R. LaVaute, Esq. (Blitman & King)*, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on February 29, March 1-3, June 13-16, July 26-29, and September 6-8, 1988, in Watertown and Syracuse, New York. On November 9, 1987, a consolidated complaint issued based on charges filed by the United Steelworkers of America, AFL-CIO, CLC, District 4 (the Union), against A.M.F. Bowling Company (Respondent). The complaint alleged that Respondent violated Section 8(a)(1) and (5) of the Act. The thrust of the complaint alleges that Respondent engaged in surface bargaining; unilaterally imposed terms and conditions of employment on the bargaining unit;

unlawfully withdrew recognition; failed to provide certain information to the Union; and, dealt directly with employees in the unit. Additionally, the complaint alleged Respondent violated Section 8(a)(1) of the Act by precluding employees in the unit from participating in Respondent's severance pay program.

On the entire record, including my observation of the demeanor of the witnesses, and on a careful consideration of the posttrial briefs, I make the following<sup>1</sup>

#### FINDINGS OF FACT

Respondent is a Virginia corporation, with an office and place of business in Lowville, New York. It is engaged in the manufacture, nonretail sale, and distribution of bowling lanes and equipment. Respondent annually purchases and receives at its Lowville, New York facility goods, products, and materials valued in excess of \$50,000 directly from points outside the State of New York. I conclude Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is admitted, and I conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Prior to the fall of 1986 Respondent was owned by Minstar. On or about August 24, 1986, Respondent signed a purchase agreement to purchase the bowling division of AMF from Minstar. A condition of the purchase agreement was that Respondent adopt all collective-bargaining agreements then in effect with Minstar, including the collective-bargaining agreement with the Union, which was to expire December 8, 1986.

The Union represented a unit of production and maintenance employees in the Lowville plant numbering about 75 employees. The employee compliment was a very stable compliment of employees. Most of the employees had years of seniority. Lowville is a very small town in northern New York, somewhere between Watertown and Syracuse, New York. It is a somewhat isolated town and new employees were often relatives of older employees with years of seniority. The Union had represented these employees for about 20 years. During this period, labor relations between Minstar and prior owners had always been rather ideal. Over the years, as collective-bargaining agreements were negotiated, the employees received modest increases in wages and benefits. Grievances were seldom filed. Differences that could have resulted in grievances were usually settled informally, without resort to the contractual grievance procedure. For example, during the term of the last collective-bargaining agreement only two grievances were filed by the Union which were settled at the second step. No grievance went to arbitration.

In late summer of 1986, after signing the purchase agreement with Minstar, Respondent retained Jack Burtch, a specialist in labor negotiations for the purpose of handling collective-bargaining negotiations with the Union when their contract expired on December 8, 1986. On September 24, 1986, the Union sent Respondent a notice of termination of the collective-bargaining agreement. Respondent closed on the purchase of the business on November 21, 1986.

<sup>1</sup> This case was a long and complex case. Counsel for the General Counsel, for the Union, and for Respondent demonstrated throughout the course of this trial and in their briefs the very highest quality of legal excellence.

On October 1, 1986, Burtch sent a letter to the Union acknowledging the Union's letter of termination of contract and offering to meet with the Union on November 10.<sup>2</sup>

The first collective-bargaining negotiation took place on December 3. The Union's bargaining negotiation committee consisted of Daniel Ritz, the local president, Carolyn Brown, George Prenette, a representative of the Union's district office, and a small committee of bargaining unit employees. Ritz and Prenette were the chief spokesmen, although the Union notified Respondent that decisions with respect to the Union's bargaining position would have to be resolved by a committee vote. Respondent's chief negotiator was Burtch who was assisted at times by Mallette and other Respondent officials.

At the outset of the session, the Union presented Respondent with a complete set of bargaining proposals.<sup>3</sup> There was very little in the way of substantive language changes proposed by the Union. The Union wanted to discuss a number of language provisions to pin them down or clarify them: for example lost time, fire drills, layoff, and increase in work force, where no substantive changes were sought. The Union did seek language to amend the prior agreement so that employees who were volunteer firemen could leave work to fight severe fires without being docked pay.<sup>4</sup> The Union also proposed language to permit the union president to observe the process of employees who were exercising bumping rights. The Union also proposed to reduce the experience requirement for entry into certain jobs from 30 to 20 days. The Union also proposed a bulletin board for plant 3 and establishment of alternate job bids for leadman in the laminating truckdriving and rim moulding departments. In summary, the Union proposed no significant language modifications. The Union proposed a 2-year agreement which was the same term as the prior agreement. As to the Union's economic proposals, the Union proposed wage increases of 8 percent for the first and second year. The Union also proposed an increase from \$150 a week in insurance coverage to \$170 a week in the first year of the contract and \$180 a year in the second year. The Union further proposed an increase in life insurance payments from a lump sum payment of \$8000 to \$9000. The Union also proposed an unspecified increase in dental coverage. The Union also proposed an unspecified increase in pension payments. The Union additionally proposed the creation of an additional personal holiday. The Union proposed to exchange an existing floating holiday for a second personal holiday. The Union also proposed a new vaca-

<sup>2</sup> The facts of this case are based primarily on the credible testimony of General Counsel witnesses Daniel Ritz and Carolyn Brown, employees of Respondent and officials of the Union, Richard Corcoran, a union official, and Rodney Mallette, Respondent's general manager of the Lowville plant (Mallette was also called as a witness by Respondent) and documentary evidence. All the above witnesses testified in a sincere and forthright manner during both direct and cross-examination. Their recollection of the facts was detailed. When confronted with documents or bargaining notes, which put some of their testimony in question, they candidly admitted their recollection might not be accurate; in some cases their recollection was refreshed. Such candor was consistently displayed whether their testimony was helpful to the party they represented or not.

Respondent's primary witness was Jack Burtch, its chief negotiator. I do not find Burtch to be a credible witness. I was particularly unimpressed with his demeanor. Burtch's testimony concerning critical issues of this case was often vague and evasive. At other times his testimony was simply unbelievable, and at other times his testimony was contradicted by his bargaining notes. Examples are set forth and described below.

<sup>3</sup> G.C. Exhs. 19 and 20.

<sup>4</sup> G.C. Exh. 2.



tion schedule so that employees would receive additional vacation time with fewer years of service. The Union further proposed to modify the requirement in the contract that employees use 2 weeks of their vacation time during the planned shutdown each year. The Union also proposed a provision in which employees could save 1 week of vacation time and be on leave without pay during 1 week of the shutdown. The Union also proposed that Respondent pay the full cost of one pair of safety shoes for the term of the 2-year contract. The old agreement required payment of up to \$24. The Union also proposed that yard employees receive two pairs of safety shoes. The Union proposed that Respondent pay 50 percent of the cost of prescription glasses for each employee. Each employee would be entitled to one pair during the term of the contract. The prior contract provided for the payment of \$25 towards a pair of prescription safety glasses. Respondent required safety glasses in all parts of Lowville plant. The Union also proposed the payment of double time for work performed by bargaining unit employees on Sundays and holidays. The old contract provided for payment at time-and-one-half. The Union lastly proposed that two jobs be upgraded.

After the Union submitted its proposals, Burtch, without submitting any bargaining proposals, told the Union that Respondent was needed to be more competitive, and would require economic concessions. Ritz replied that Respondent would have to justify the need for such economic concessions.<sup>5</sup> Burtch then stated that the owners had just taken over the business in November and had not had a chance to look over the prior contract or review the operation and then did not know much about it at this time. Burtch then asked for a 30-day contract extension. The Union agreed.<sup>6</sup> The parties agreed that any agreement reached would be retroactive to December 8.

I conclude Burtch's testimony concerning Respondent's lack of time to prepare for negotiations by December 3 to be untruthful. There was no reason that Respondent should not have been fully prepared to bargain with the Union on December 3. They had economic data available to them at least since August 24. They certainly had access to the prior collective-bargaining agreements. Burtch had been retained since at least September 1 or thereabouts and had 3 months to prepare for the December 3 negotiation. To meet with the Union 5 days before the contract is set to expire and claim that he was not prepared to bargain is inexcusable and unbelievable. Such contentions by Burtch not only reflect adversely on his credibility, but evidences bad-faith bargaining by Respondent.

The second bargaining session took place on December 16. Respondent submitted a single language proposal concerning the grievance procedure. The existing agreement defined a grievance as follows:

A grievance is a complaint by an Employee or the Union against the Employer or vice versa because of an

alleged violation of a specific provision of this Agreement.

Respondent's proposal struck out the words "vice versa" from the existing provision. On its face, it would appear to be a proposal favoring the Union by preventing the Respondent from filing a grievance and utilizing the grievance procedure. The parties discussed this proposal and Burtch told the Union that it was made simply to correct the contract language to reflect the actual practice of the parties. However, on cross-examination Burtch admitted the language change was really proposed in order to give Respondent access to the courts for injunction proceedings against the Union in appropriate situations.

The parties then discussed some of the Union's language proposals. Respondent agreed that if volunteer firemen were needed up to 10 employees could leave the plant to fight fires. Respondent agreed that the Union could have a bulletin board in plant 3. Additionally, procedures on the negotiation committee and funeral leave were discussed and confirmed. Then Respondent made its first economic proposal. The proposal set forth the 10 present job grades with proposed rates for each grade as a starting rate, after the probationary period, after 6 months and after 1 year. The weighted average for Respondent's proposal was \$6.86 an hour, as compared with the existing weighted average of \$9.04 an hour. Respondent was proposing a 24-percent wage cut. Respondent also proposed a 14-percent overall reduction in fringe benefits. The proposal did not specify which benefits would be reduced. Ritz asked Burtch why such extensive wage cuts were necessary. Burtch replied Respondent needed the cuts to be competitive. Ritz demanded justification for Respondent's position. Burtch merely restated his initial position. Ritz then asked why Respondent was proposing to reduce benefits and what benefits were being reduced. Burtch did not respond. Ritz then counterproposed that the Union would reduce its wage proposal from an 8-percent increase the first year to a 6-percent increase. Ritz testified he made this proposal to see if Respondent would move on its wage proposal. When Burtch did not indicate any movement Ritz then asked Burtch what rates Respondent was interested in. Burtch made no further response. Ritz pointed out that the Lowville operation was profitable and asked why all of a sudden Respondent required such large cuts in wages and benefits. In fact 1986 had not been a profitable year for Respondent. The years prior to 1986 had been generally profitable years. However, the economic indications for 1987 appeared to forecast a profitable year. Burtch again stated Respondent wanted to be competitive with manufacturing operations in the geographical area. Ritz then asked Burtch if the employees agreed to accept lower wages would Respondent consider implementing a profit-sharing plan so that if Respondent had a good year, the employees could recoup their money. Burtch did not respond to this proposal and the session ended.

On or about December 23, Frank Genovese, one of Respondent's owners, told Plant Manager Rodney Mallette to review the entire Lowville operation and prepare a new grade job classification and wage structure which were to reflect Mallette's views as to actual job classifications and grades and what rate of pay should be assigned to each job and grade. Mallette prepared such document by December 31. The job classification and grade structure prepared by

<sup>5</sup> Burtch testified the Union did not ask why Respondent was seeking concessions. I find such testimony highly improbable and adversely reflective on Burtch's credibility.

<sup>6</sup> Burtch testified that it was the Union who requested an extension. He subsequently testified he didn't know who requested the extension. Because Respondent was not prepared to engage in collective bargaining on December 3, I would conclude that it was Respondent that was seeking an extension. I find Burtch's testimony on this issue both contradictory and evasive.

Mallette was significantly different from the present contractual grade structure and job classifications. The existing structure had various job classifications in 10 pay grades. Mallette's new structure eliminated some old job classifications, created various new job classifications and broke down the unit into 16 pay grades. The weighted average pay rate of Mallette's proposal was \$6.72 an hour, or a proposed pay cut of 26 percent.

The third bargaining session took place on January 6, 2 days before the extended contract was to expire. At this late date Respondent presented its initial language proposals. This language proposal eliminated or modified virtually every significant language provision in the present agreement. Various economic proposals were also presented.

Respondent proposed that the union-shop provision of the existing collective-bargaining agreement be removed. The union-security clause in the existing contract provided that all employees be members of the Union. Such union-security provision had been included in all prior agreements.

Respondent proposed that the existing agreement be amended so that employees spending working time conferring with Respondent concerning grievances would not be paid. The prior agreement provided employees would be paid.

Respondent proposed, for purposes of bidding and bumping, that employee selection would be based on ability as determined solely by Respondent. Only when in Respondent's judgment, ability was equal, would seniority be considered. The proposal also provided that Respondent's judgment would not be subject to the grievance procedure. The existing collective-bargaining agreement provided that such selection process would be made in order of seniority. The existing agreement also provided that Respondent's failure to apply seniority principles would be grievable.

Respondent proposed that new employees would have no seniority rights and would be considered on probation for 90 days actually worked. The existing agreement provided that employees would be on probation for the first 30 workdays of employment.

Respondent proposed that the job grading decisions would not be grievable. In prior agreements such decisions were subject to the contractual grievance procedure.

Respondent reiterated its previous proposal on the definition of a grievance which precluded the Employer from filing a grievance.

Respondent proposed that the cost or expense of the arbitrator, "reporter" and the conference room should be borne by the losing party. Under the existing agreement the cost or expense of the arbitrator and the conference room would be shared equally by the Employer and the Union. Respondent's proposal implicitly provided that arbitration would be transcribed by a court reporter. Respondent also proposed the elimination of two holidays.

Respondent proposed a new schedule for vacations which limited the maximum amount of vacation time which could be accrued to 160 hours and required 20 or more years of service to arrive at the top level. Under the existing agreement, employees could accrue up to 200 hours of vacation leave and would arrive at the 120-hour and 160-hour level sooner than as proposed by Respondent.

Respondent proposed that employees contribute \$14 per month for the pension plan. Under the existing agreement

employees did not pay for pension coverage at the basic level.

Respondent proposed that employees contribute \$22 per month for single employee medical coverage and \$66 per month for family coverage. Under the existing agreement employees paid 42 cents per week for single employee coverage and \$1.15 per week for family coverage.

Respondent proposed that a precertification plan be implemented for hospitalization admissions. This proposal was new.

Respondent proposed that the coinsurance reimbursement rate be dropped from 90 to 80 percent.

Respondent proposed that any premium increases in health insurance be borne by the employees.

Respondent proposed that the existing 1-year extension of benefits for disabled individuals be deleted and that the individual merely be offered a COBRA extension required by law. Respondent proposed that the existing dental coverage be deleted.

Respondent proposed that nonbargaining unit personnel (e.g., supervisors) could perform work ordinarily performed by the unit employees. No limitations were proposed. Under the existing agreement, nonbargaining unit personnel could perform bargaining unit work only under the five enumerated circumstances set forth therein. Those conditions were:

1. to experiment with equipment or new methods of performing the operations;
2. to train employees;
3. to assist where machinery malfunctions occur;
4. to manufacture and assemble prototype and experimental models; and
5. to perform work of an employee where there is excessive absenteeism and such work is necessary provided that there are no other employees available to do the work.

Burch then commented on Respondent's proposals. With respect to Respondent's proposal to eliminate the union-security provisions, Burch stated the new owners believed the employees should have the right to decide whether to join a union. With respect to Respondent's proposal to eliminate pay when employees were processing grievances, Burch stated that they were not working when processing grievances and should not be paid when not working. During the prior agreement only two grievances had been filed. Resolution of these grievances averaged between 20-30 minutes each. With respect to Respondent's proposal effectively eliminating seniority as the basis for bidding or bumping on jobs, Burch stated the reason for this proposal was to eliminate a practice where some employees would bid or bump and then disqualify themselves. Ritz credibly testified that Respondent never complained to the Union about any problem in this area. Moreover, the Respondent's proposal would not solve this problem. With respect to the second half of Respondent's seniority proposal which would prohibit the Union from grieving Respondent's selection, Burch would not state the reason for this proposal other than to state it was Respondent's business. With respect to Respondent's proposal to raise the probationary period from 30 to 90 working days, Burch stated that 30 days was insufficient time to determine an employee's worth. With respect to Respondent's proposal to eliminate the Union's right to grieve

Respondent's grading of jobs Burtch stated that such issue was Respondent's prerogative. With respect to Respondent's proposal for using a stenographer during arbitrations and having the losing party pay the total cost of the arbitration, Burtch gave no reason for this proposal.

Burtch did not comment as to Respondent's economic proposals. Ritz asked why the employee's pension contribution of \$14. Burtch did not respond. When Ritz asked Burtch the reason for the reduction of the economic proposals described above, Burtch did not respond.

During the course of further negotiation Ritz asked if Respondent's December 16 wage proposal was still on the table. Burtch stated it was. This statement was untruthful. As set forth above, Mallette had already prepared an entirely new proposal with new job classifications, grades, and a regressive wage structure of 26 percent as against the 24-percent wage cut proposed in Respondent's December 16 proposal. However, Respondent did not introduce this proposal until the January 7 negotiation set forth below. Such untruthful conduct further diminishes my impression of Burtch's credibility. The parties recessed at this point for lunch.

In the afternoon, the Union presented its response to Respondent's proposals. Ritz told Burtch Respondent's proposal to eliminate union security was unacceptable. Ritz stated the Union would consider Respondent's proposal to eliminate no grievance pay. Ritz stated Respondent's proposal to eliminate seniority on bidding and bumping and to eliminate the right to grieve Respondent's selection based on ability was unacceptable. Ritz proposed a compromise of 45 days on Respondent's probationary proposal of 90 working days. Ritz stated Respondent's proposal that job grades could not be grieved was unacceptable. Ritz stated the Union would consider Respondent's amendment to the definition of a grievance. Ritz stated the Union would agree to Respondent's arbitration cost proposal if Respondent dropped its proposal on union security, seniority on bidding and bumping, and no grading grievances. Ritz stated the Union would consider accepting Respondent's proposed reductions on holidays, vacations, and insurance if Respondent reconsidered its proposals on wages. Ritz stated the Union would not agree to nonunit personnel being allowed to perform unit work. The Union also agreed to various Respondent language proposals involving no substantive changes.

On January 7 the parties met again. At this time Burtch handed the Union its new wage proposal prepared by Mallette. As set forth above this proposal was significantly different from Respondent's original proposal of December 16. This proposal had new and different job classifications and varied from the 10 present job grades to 16 job grades. Moreover, the wage proposal was regressive, providing for an overall wage cut of 24 percent as against the 22-percent wage cut set forth in Respondent's December 16 proposal. The Union representatives were taken by surprise at this new proposal and tried to equate the new job classifications and grades with the present ones. Burtch assured them it was really the same wage proposal as the December 16 proposal, except that the new job classifications were more descriptive. When cross-examined on this issue Burtch maintained this position. Burtch's untruthful statements to the Union and his untruthful testimony further diminish his credibility. Significantly, such drastic and regressive proposal was presented to

the Union a day before the extended collective-bargaining agreement was due to expire.

During this negotiation Burtch also presented the Union with a new language proposal. The new proposal was virtually the same proposal as the January 6 proposal except that a new seniority proposal substituted the phrase "decrease increase, or transfer of employees" rather than "bid and bump." This phrase substitution did not alter the substantive intent of Respondent's original seniority proposal by which the selection of employees was based on Respondent's judgment of ability rather than seniority which was the existing procedure. The only other modification in Respondent's language was that Respondent would modify its proposed probationary period from 90 to 60 working days.

After Respondent's proposals were submitted the parties caucused. A mediator was brought in to attempt to resolve negotiations. The mediator met with Respondent and then with the Union. He told the union representatives that Respondent's insistence on an open shop would be a sticking point. Ritz complained about Respondent's proposals relating to union security, seniority, and nonunit personnel performing unit work. He stated Respondent had not advanced any reasons for the elimination of these items and that such proposals were contrary to 20 years of prior collective-bargaining agreements.

The Union and Respondent then met together with the mediator. Ritz responded to Respondent's new language proposal. The Union agreed to accept the Respondent's 60 working day probationary period, and its definition of a grievance. Ritz stated the Union would accept Respondent's arbitration cost proposal if Respondent would drop its insistence on an open shop, elimination of seniority, and no grading grievances as to the remaining proposals the Union adhered to its earlier position.

The Union then discussed Respondent's wage proposal. Ritz stated that Respondent's present wage proposal was less than the December 16 proposal. Burtch denied this insisting that they were the same. As set forth above, in this regard, Burtch was untruthful. Ritz stated that the Union would accept a wage freeze for the first year and a 3-percent increase for the second year for present employees and Respondent could apply its present wage offer to new hires. Burtch did not respond, but rather shifted the discussion to the length of an agreement proposing a 3-year agreement. The Union agreed.

The parties caucused and reconvened. At this time Burtch handed the Union a new and revised job grade chart which consisted of 10 job grades. The new job classifications were fitted into these 10 grades. However, there was no wage proposal corresponding to the new grades. Ritz asked Burtch what wages would correspond to the 10 grades. Burtch stated the 10-grade system was proposed to satisfy the Union. He did not respond to Ritz' question as to the wage rates. Ritz stated the Union needed the wage rates to properly evaluate Respondent's proposal. Mallette, during the trial, admitted that Respondent's new 10-grade proposal had been prepared with corresponding wage rates but Burtch deliberately photocopied the document covering up the proposed wages so that he could hand it to the Union without the proposed wage rates. I find such conduct further diminishes Burtch's credibility, and evidences a lack of good-faith bargaining by Respondent.

Burtch then presented a new language proposal. Respondent dropped its proposal that union representatives would not be paid for time spent resolving grievances. There were some minor language changes. There were no other substantive changes from Respondent's last proposal. During discussions that followed, Burtch stated that Respondent would drop its arbitration cost proposal if the Union would accept Respondent's proposals on no-union-security provision, no seniority, and nonunit personnel performing unit work.

The Union caucused to consider Respondent's proposals. They met again with Respondent. Prenette stated that the Union would agree to a wage freeze the first year, and leave the second and third years open. Prenette offered to move on holidays but stated the employees needed to keep medical coverage intact. Prenette then discussed Respondent's language proposals. He agreed on behalf of the Union to accept Respondent's arbitration cost proposal. He stated that if Respondent would drop its insistence on no-union-security provision, the Union would accept a wage freeze and move on other economic benefits. Burtch responded that Respondent was seeking large wage cuts now and that the parties were far apart. Prenette, on behalf of the Union, rejected Respondent's other proposed language change proposals. The session then ended.

The parties met again on January 8, the date the extended contract was to expire. At the beginning of this session Burtch provided the Union with a new wage proposal. The proposal was the same 10-grade structure as provided by Respondent on January 7 except that it now had a wage structure which had been previously blanked out by Respondent. However, the wage structure did not set forth the time periods such wages were to be in effect. Moreover the weighted average wage was \$6.72 an hour, a regressive wage proposal when measured against Respondent's initial December 16 wage proposal of \$6.86 an hour. Respondent did not present a new language proposal, but informed the Union that it would drop its demand that its selection of employees for job positions would not be subject to the grievance procedure. However, it would not drop its demand that job position selection should be determined by Respondent based on its judgment of ability, rather than on seniority as in all prior agreements. Burtch also dropped Respondent's insistence that job grades could not be grieved.

The Union then discussed the job classifications set forth in Respondent's wage proposal. Although the present grade system was a 10-grade system, many of the job classifications were new. Ritz stated the Union would agree to Respondent's proposed benefit plan if Respondent would agree to a wage freeze for the first year. Ritz told Burtch he felt he could sell this package to the employees. Burtch replied that the Union was not addressing Respondent's proposed wage cut. Ritz requested Respondent to supply the Union with substantiation or documentation as to why such a huge pay cut was necessary. This request was made by Ritz or Prenette at every meeting that Respondent's demand for a wage cut was discussed. However, Respondent never supplied the Union with such information. Thus far in negotiations, Respondent's only wage proposals had been the December 16 \$6.86 an hour wage proposal, a 24-percent pay cut and present wage proposal of \$6.76 an hour, or regressive pay cut of 26 percent.

Burtch then dropped Respondent's proposal on employee contributions to the pension plan. The parties caucused and returned in the afternoon. At this time Burtch presented the Union with a new wage, benefit, and language proposal. This wage proposal was a 2-year proposal which provided for a \$7.10 an hour weighted average. This proposal reduced the Respondent's proposed pay cut from the 24-percent cut initially proposed on December 16, to a 22-percent pay cut. The proposed economic benefits and language proposals were unchanged. Thus, as the contract was about to expire Respondent was insisting on a 22-percent wage cut, approximately a 14-percent cut in other economic benefits, including the elimination of the dental plan, and language proposals eliminating union security, seniority, grieving the grading of jobs, and providing that nonunit personnel could freely perform unit work. Burtch told the Union that these proposals represented Respondent's "bottom line." The session ended.

On the evening of January 8 the Union held a ratification vote. Respondent's contract proposals were unanimously rejected. The employees voted not to strike, but authorized their negotiation committee to seek a contract extension. The Union met with Burtch after the vote. Ritz informed Burtch of the results of the ratification vote and requested an extension of the contract. Burtch refused to extend the contract.

Burtch and Genovese testified that they met prior to the January bargaining sessions with the Union, and that Genovese gave him authorization to make significant concessions in Respondent's proposed contract language and work rules if he felt he would be able to get a major economic concession from the Union. I find such testimony unbelievable since it is simply contrary to what took place at the bargaining table throughout the entire course of negotiations. Thus, Respondent never, throughout the entire course of bargaining, significantly moved off its initial language proposals (union security, seniority, no-grading grievances, and nonunit personnel performing unit work). Moreover, Respondent made regressive wage proposals. Further, Respondent refused to extend the contract although the Union had not authorized a strike.

The parties met again on January 14. Burtch provided the Union with a new contract proposal. An examination of this proposal establishes that no new language proposal was made.<sup>7</sup> Respondent did propose a significant restructuring in job classifications, placing certain classifications in different grades. However, such restructuring was proposed solely to benefit Respondent. It was not in response to any of the Union's proposals or positions. Respondent proposed a wage reduction from its January 8 proposal of \$7.10 an hour to \$7.25 an hour.

The parties discussed Respondent's proposals. They restated positions previously stated at other sessions, but were unable to reach any agreement. Burtch testified he told the Union if it would move off its wage freeze, Respondent could be flexible in other areas. He testified by "other areas" he meant the central language proposals at issue, i.e., union security, etc. I do not believe this testimony. No new language proposals were set forth in Respondent's written proposals. If Burtch were really interested in changes in language, he could have directly proposed such changes. For example, he

<sup>7</sup> Respondent merely modified its seniority proposal to be consistent with the new job classifications proposed on January 14.

could have simply stated during negotiations that Respondent would withdraw its objection to inclusion of a union-security provision in an agreement if the Union would agree to some specified economic concession.

Burtch and Prenette then met in private for a period of time. This meeting did not result in any new proposals or in any agreement to Respondent's proposals.

The parties then met again. There was more general discussion but no new proposals or agreement. The session ended.

The parties met again on January 15 with the mediator present. Neither Respondent nor the Union submitted any new proposals. The discussions that took place at the January 14 meeting were essentially repeated. Burtch told the parties he had put Respondent's final proposals on the table on January 14 but the Union was not willing to move. He testified that at this point he asked the Union "is there any concession we can make." For the reasons set forth above, I discredit this testimony. The session ended without any movement.

On January 16, 1987, the Union received a telegram from Respondent which stated that Respondent's final offer of January 14 expired on January 20, 1987. The telegram also stated that if the Union did not accept Respondent's January 14 offer by midnight on January 20 Respondent would implement the wages and benefits of that offer.

On January 20, 1987, the Union took another ratification vote among its members. The members unanimously rejected Respondent's January 14 offer.

On January 21, the Union sent Respondent a telegram informing Respondent that there was no impasse between the parties and that the Union had a counteroffer which it wanted to present. Additionally, the Union informed Respondent that any unilateral imposition of terms and conditions would be violative of the Act.

On January 21, 1987, Respondent unilaterally implemented the wages and benefits of its January 14, 1987 offer.

On January 27, another negotiation session took place. The mediator was present. The Union presented a counteroffer to Respondent's January 14 proposals. The offer proposed a Blue Cross/Blue Shield medical plan that would offer savings over the present plan. The Union proposed giving up two holidays if Respondent would give up its demand for no-union security. The Union also proposed that if Respondent would drop its proposal that employees contribute to insurance policies, the employees would pay any premium increases. The Union further proposed that it would consider buying the plant. The Union agreed to Respondent's proposal for a precertification plan for hospital admission. The Union agreed to the Respondent's proposal of obtaining a second medical opinion. The Union also agreed to Respondent's proposal for coinsurance and medical insurance. The Union further agreed to Respondent's proposal that dental coverage be eliminated.

A discussion followed. During the discussion Burtch repeatedly made it clear that Respondent was not going to modify its January 14 proposal. Prenette repeatedly told Burtch that if the Respondent would modify its demands for the huge wage cuts proposed by the January 14 offer the Union would modify its proposal for a wage freeze and accept some pay cuts. Prenette indicated flexibility on this issue. In response, Burtch repeatedly told Prenette the Union

would have to accept the Respondent's January 14 offer and that the parties were at impasse.<sup>8</sup> The session ended at this point.

Although the Union proposed to give up two holidays if Respondent would drop its demand for no-union security and although the Union proposed significant economic flexibility in accepting pay cuts, Burtch never proposed or discussed with the Union the possibility that it would drop its demand for no-union security or the other objectionable language provisions if the Union would accept the Respondent's proposed pay cut or something substantially close to it. Burtch instead kept insisting that the Union must accept Respondent's January 14 offer, and that the parties were at impasse. If Burtch were really serious about reaching an agreement and if he really had the latitude to modify Respondent's language proposals for economic concessions as he testified, he would have explored the Union's proposal of language proposals for pay cuts.

About late January or early February 1987, Respondent's owners donated \$10,000 to one of the churches in Lowville to be distributed to Respondent's unit employees who were experiencing financial difficulty as the result of Respondent's pay cuts resulting from Respondent's implementation of its January 14 proposals. Respondent Supervisor Joe Zehr was one of a three-man distribution committee in charge of the actual distribution of these funds to Respondent's employees. In February, the church sent letter to Respondent's employees informing them as to the availability of such funds. As a result of Respondent's action a number of Respondent's employees received financial aid.

There were no further scheduled bargaining sessions. On March 4 the Union sent a letter to Respondent requesting another negotiation session.

On March 16 Burtch responded by letter stating that although the Union had modified its proposals in some minor areas during the January 27 meeting he believed the parties were at impasse and unless the Union's position was "altered drastically" further meetings would be futile. Respondent refused to meet with the Union at this time.

The Union thereafter enlisted the aid of the mediator who was successful in setting up a meeting for April 30.

The final meeting between the parties took place on April 30. Richard Corcoran, the Steelworker's subdistrict director acted as the union spokesman. The mediator was also present. Corcoran told Burtch that the Union would (1) accept Respondent's proposal to eliminate seniority as the basis for bidding on jobs, accept Respondent's proposal on holiday cuts, and accept Respondent's vacation cuts for first year bargaining unit employees. The Union proposed a new reduced prorated schedule for other unit employees. The Union agreed to accept some of health care cuts, but proposed an increased deductible and copayment schedule. The Union also agreed to accept Respondent's job classification system. The Union proposed a 3-year agreement leaving to Respondent's discretion whether it would begin retroactively in December or commence immediately. Corcoran then stated Respondent's proposal to eliminate union security would fundamentally jeopardize the Union and was unacceptable. Burtch merely restated that Respondent's position was based on philosophical differences. He did not, contrary to his al-

<sup>8</sup> See Burtch's direct testimony. Pp. 1961-1964 and R. Exh. 27, pp. 4, 5.

leged authority, propose to eliminate union security or other objectional language provisions if the Union would agree to substantial wage cuts. Corcoran then discussed the Union's objection to Respondent's proposal to permit nonbargaining unit personnel to perform unit work. Burtch made no response. Corcoran then stated the Union would agree to a 10-percent wage cut for the first year, a 3-percent increase for the second year, and a 4-percent increase for the third year. The Union also proposed development of a profit-sharing plan. Although the Union had proposed a large and significant wage cut and agreed to eliminate seniority in connection with bidding on jobs, Burtch did not offer to modify the Respondent's other objectional language proposals if the Union would be more flexible on the wage cut. Instead, he responded to the Union's entire package by stating he had "wasted his time" by coming to this meeting. Corcoran replied the Union was flexible and were at least entitled to a response. The parties caucused. On return Burtch stated the parties were far apart. Burtch *insisted* that the Union accept its January 14 proposals. Burtch then added he might have to restructure Respondent's seniority proposals which the Union had just agreed to. The parties again caucused. When the parties returned Burtch simply rejected the Union's entire proposal stating "there is nothing for us to say." Burtch admitted at the trial that Respondent never costed out the Union's proposals. The session ended. There have been no further meetings.

On May 17, 1987, Respondent informed the Union and individual members that it was unilaterally changing the vacation accrual system to conform to that of the salaried, nonbargaining unit employees.

On May 28, 1987, Respondent withdrew recognition from the Union based on a petition signed by 69 bargaining unit employees who stated they no longer wished to be represented by the Union. Respondent telegraphed the Union stating that it was withdrawing recognition and would no longer bargain.

A short time after recognition had been withdrawn, Respondent fully implemented the policies contained in its salaried employees' personnel manual. Respondent informed the bargaining unit members of the new terms and conditions of employment at a series of small in-plant meetings called by Respondent. At one of these meetings Respondent instructed its employees to elect representatives and instituted a new grievance procedure. Respondent explained to its employees that it had withdrawn recognition of the Union and would implement new policies pertaining to life insurance, sick leave, length of service awards, tuition reimbursement, cash length of service awards, severance benefits, and that it would form an in-plant grievance committee.

In addition, Respondent instituted a monthly production bonus system. Mallette admitted that the bonus plan was prompted by the owners' belief that employees should "share in the good times," and was approved shortly after recognition was withdrawn. These production bonuses could be routinely earned with normal production. Respondent fully predicted prior to implementation that each employee would have met their production quotas for the months the policy was implemented. Respondent also unilaterally implemented a profit-sharing plan that was similar to the Union's January proposal. Respondent created contests with cash awards for such things as absenteeism, safety, production, quality con-

trol, and attitude. A merit review policy was commenced by Respondent in September 1987.

On August 6, 1987, the Union made a written request of the Respondent for records concerning the amount and manner of contributions for the new pension plan applied to the bargaining unit employees and information about how the plan was established. The Union needed the information to verify that contributions were being made and that the funds were going into the plan. The Union had previously made an oral request during the January 8 negotiation and still had received no response. It was not until October 15 that Respondent provided a partial answer. However, the information provided by Respondent lacked a copy of the trust instrument, a copy of the plan, the plan description, a statement of current accrued benefits, dates and amounts of contributions, and names of those for whom contributions had been made.

In June 1987 Respondent instituted a grievance or department representative committee. Employees were directed to raise grievance type problems with the committee in order to resolve the problems. These problems would include pay or working conditions. The elected representatives met informally and handled problems such as bidding. Meetings of the department representative's committee took place on company time.

#### Analysis and Conclusions

The Board in *Houston County Electric Cooperative*, 285 NLRB 1213 (1987), set forth the standards to be applied in determining whether a party is engaged in good-faith bargaining within the meaning of Section 8(a)(5) of the Act:

Section 8(a)(5) of the Act establishes a duty "to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement." *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960). As the Supreme Court stated in *NLRB v. Insurance Agent's Union*, 361 U.S. 477, 485 (1960):

Collective bargaining, then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of "take it or leave it"; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract.

This obligation, of course, does not compel either party to agree to a proposal or to make a concession. *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952). Moreover, as the Board stated in *Rescar, Inc.*, 274 NLRB 1, 2 (1985), "it is not the Board's role to sit in judgment of the substantive terms of bargaining, but rather to oversee the process to ascertain that the parties are making a sincere effort to reach agreement." The Board there referred to its earlier decision in *Atlantic Hilton & Tower*, 271 NLRB 1600, 1603 (1984), in which seven traditional indicia of bad-faith bargaining were listed as follows:

Such conduct includes delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargain-

ing authority, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meetings.

The facts of the instant case establish clearly that throughout the entire course of bargaining, Respondent made language and economic proposals designed to frustrate an agreement, made regressive economic proposals, refused to supply wage surveys and other data on which such economic proposals were allegedly based, although repeatedly requested to do so by the Union, made unexpected and significant wage and language proposals without affording the Union sufficient time to evaluate and consider the effect of such proposals, surreptitiously offered funds it was withholding from the Union to the bargaining unit employees in order to undermine the Union, and ultimately unilaterally granting to the bargaining unit employees many benefits the Union was seeking at the bargaining table. The totality of Respondent's conduct establishes conclusively an attempt by the new owners to rid itself of the Union which had been the collective-bargaining representative of the unit employees for over 20 years.

The Board has held that when an employer makes an entire spectrum of proposals that are so consistently and predictably unpalatable to a union so that the employer should know an agreement is impossible, an inference can be drawn that such proposals were made to frustrate an agreement. *Richhold Chemicals*, 288 NLRB 69 (1988). In *NLRB v. A-1 King Size Sandwiches*, 732 F.2d 872 (11th Cir. 1984), the court upheld the Board's inference of bad faith from the employer's insistence on proposals that were "so unusually harsh and unreasonable that they were predictably unworkable." Similarly, in *Prentice-Hall, Inc.*, 290 NLRB 646 (1988), the employer engaged in surface bargaining by the totality of its conduct, including proposals that would have rendered substantial portions of the contract unenforceable. Even though the employer's negotiators appeared regularly at negotiations and the negotiations resulted in agreement on some subjects, the employer's proposals, including those removing substantial portions of the contract from recourse to grievance and arbitration, were put forward in bad faith, thereby indicating an intent not to reach complete agreement with the Union.

In the instant case Respondent's language proposals alone, which Respondent insisted on throughout the entire course negotiations, eliminated provisions enjoyed by the Union since they became the bargaining representative of the unit employees herein. Such provisions were essential to the Unions' role as a bargaining representative. In this connection Respondent proposed that the union-security provisions be eliminated, that the bidding and bumping of jobs which had always been according to seniority be eliminated and that Respondent would instead make such decisions unilaterally, based on its estimation of an employee's ability, and that the Union could not grieve such decision. Respondent also proposed to eliminate disputes relating to job grades from the grievance procedure. Respondent further, and significantly proposed that Respondent could freely assign non-bargaining unit employees to perform unit work. This proposal alone would emasculate the Union's representation of the bargaining unit as it would effectively render the definition of the bargaining unit meaningless.

The first item of Respondent's complete set of proposals on January 6, provided only 2 days before the contract as extended by the Union was to expire, proposed to eliminate all forms of union security. The only reason Respondent could advance for such inflammatory proposal was a philosophical one. In *Atlas Metal Parts Co.*, 252 NLRB 205, 220 (1980), enf. denied 660 F.2d 304 (7th Cir. 1981), the Board noted that the employer's proposal to eliminate any form of union security was not based on any concern over the well being or interests of its employees. The Board reasoned, therefore that such an inflammatory proposal was evidence that the employer did not approach the bargaining table with the intent to find common ground on which the parties could resolve their differences.

In the instant case, when asked by the union president why Respondent wanted the union-shop provision removed, Respondent's chief negotiator, Jack Burtch, only could recite a philosophical reason by stating that the owners felt it should be an employee's right to belong to a union or not. At no time could Respondent cite any problem or complaint by a bargaining unit employee, manager or supervisor with the application of the union-security clause. In addition, Respondent's chief negotiator, an experienced management attorney, at no time suggested any alternative union-security proposal, such as maintenance of membership or agency shop which would encompass a bargaining unit member's right to choose union affiliation throughout the employment relationship.

The record also clearly establishes that Respondent's open shop demand was not bargaining chip that Respondent was willing to trade off for a gain in another area of disagreement. Burtch testified that Respondent was prepared to offer the Union a full union-shop proposal if the Union would accept a wage cut. However, on April 30 after the Union proposed a 10-percent wage cut Respondent never proposed trading off union security at this point or prior thereto in negotiations in order to achieve a further wage cut it was seeking. In *Magic Chef, Inc.*, 286 NLRB 380 (1987), the employer bargained in bad faith in part because it never gave the Union an indication that check off was available in return for economic concessions. The administrative law judge reasoned, and the Board agreed, that the employer's desire to use checkoff as a bargaining tool was disingenuous. "If, as it claims, Respondent stood ready to trade checkoff in return for other concessions, it carefully hid that possibility as it permitted negotiations to founder."

Respondent's proposals to eliminate seniority on bidding and bumping and remove job grading from the grievance procedure were also predictably unpalatable to the Union. *Richhold Chemicals*, supra. By maintaining exclusive control over these significant provisions of the proposed contract, Respondent's proposals denigrated the representational role of the Union and made substantial proportions of the proposed contract virtually unenforceable. *Prentice-Hall*, supra. In *Continental Insurance v. NLRB*, 495 F.2d 44 (2d Cir. 1974), the court recognized that in addition to other indicia of bad-faith, the employer insisted on a contract in which the Union would be "virtually surrendering its right to represent employees in disputes over working conditions." Particularly apt was the court's note that a no-strike clause was coupled with the limited opportunity for the arbitration of disputes.

In the instant case, on January 6, Respondent proposed to change the bidding and bumping procedure from one where

seniority governed to a selection based on ability as solely determined by Respondent, with the proviso that only where, in Respondent's opinion ability was equal, seniority would govern. Respondent further demanded that its judgment would not be subject to the grievance procedure. After the Union objected and wanted to know what was wrong with the old language, the next day Respondent presented a new proposal that included ability in the definition of seniority but again excluded the Respondent's judgment about ability from the grievance procedure. Burtch tried to represent to the Union that Respondent was reinstituting some of the language in the old contract and that Respondent's new proposal was a modification of its January 6 proposal by restoring the balance between seniority and ability. However, the January 7 proposal was actually more onerous than the previous proposal, as it did not restrict seniority to just bidding and bumping.

Although Respondent dropped its demand to exclude seniority from the grievance procedure on January 8, it continued to adhere to its demand for the definition of seniority to be determined primarily by ability throughout the negotiations including the last negotiation on April 30. The fact that Respondent included such proposal in its final offer of January 14 and maintained that position through the final meeting in April 30 is clear evidence of bad faith. *Magic Chef, Inc.*, supra.

Respondent ultimately dropped its proposal to eliminate disputes concerning job grades from the grievance machinery. However, I conclude such concessions were merely a "cloak" of making "concessions here and there" which "could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail." *NLRB v. Herman Sausage Co.*, 275 F.2d 229 (5th Cir. 1960). Such "shadow boxing" does not meet the employer's obligation of bargaining in good faith with intent to reach agreement. *Herman Sausage Co.*; *Houston County Electric*, supra.

Throughout the entire course of bargaining Respondent insisted on a proposal which would permit nonbargaining unit personnel to perform bargaining unit work. There were no limitations on this proposal. In *NLRB v. A-1 King Size Sandwiches*, supra, the court upheld the Board's holding that a similar proposal to have supervisors or other nonunion employees perform unit work was so unusually harsh and unreasonable that it was an indicium of bad-faith bargaining. Id. at 732 F.2d at 873. Insisting to impasse on a bargaining proposal that alters the description of the bargaining unit violates the Act per se. See *Standard Register Co.*, 288 NLRB 1409 (1988). In *Standard Register*, the employer took the adamant position that it needed flexibility in assigning the work and equipment and sought to redefine the description of the bargaining unit. Id. at 1409. The Board held that the proposed clause would give the employer "unfettered discretion to redefine the unit at any time by changing the assignment of work" and that such unilateral control was tantamount to a refusal to include a unit description. Id. at 1410 (citing *Newspaper Printing Corp.*, 232 NLRB 291 (1977), enf'd. 625 F.2d 956 (10th Cir. 1980), cert. denied 450 U.S. 911 (1981)).

Respondent in the instant case insisted on maintaining exclusive control over the size and scope of bargaining unit work with its broad proposal that any "non-bargaining unit personnel (including supervisors) could perform unit work. Respondent's chief negotiator, Burtch, an experienced man-

agement attorney, drafted the language. Although he initially testified that the language was designed to give Respondent flexibility on the right of supervisors to step in the production line in case of absenteeism or trouble on the line, on cross-examination, he admitted that the language on its face was *broader than supervisors* and that some arbitrator "could look at that and interpret it different [sic] than I have." He finally admitted that he purposefully used the term "non-bargaining unit personnel" because there was a possibility he "might have missed something."

Respondent was aware that such broad language was objectionable to the Union because the Union stated during its initial meeting on December 3 that it was concerned about erosion of unit work and a reduction in the work force. Yet Respondent never proposed to change the language to state only "supervisors" and never explained to the Union that Respondent supposedly intended it to be so limited. Respondent's claim that the clause was limited to supervisors is undermined by the fact that Owner Goodwin told Burtch to go through the contract to make the language more flexible "to place employees in different jobs." Respondent's attempts to obtain language broader than the scope suggested to the Union was plainly disingenuous. I conclude Respondent proposed such clause in conjunction with the other language proposals discussed above as part of its overall plan to denigrate the Union and its representational role.

With respect to the Respondent's economic proposals, the evidence established that Respondent purposefully delayed in making a detailed wage proposal until a day before the contract was to expire; and that Respondent rigidly adhered to its demands for huge wage cuts and severe reductions in benefits, citing its desire to be competitive with wages and benefits in the area based on various wage and benefit surveys. Yet, notwithstanding significant flexibility by the Union as to their wage and benefit proposals, Respondent instead made counterproposals which were regressive. Moreover, despite persistent demands by the Union to obtain copies of the surveys Respondent was allegedly basing its economic proposal on, Respondent repeatedly refused to furnish the Union with such information. Further, Respondent radically altered the employee classification and wage structure immediately prior to the expiration of the extended agreement and then refused to extend the agreement so that the Union would have reasonable time to study and evaluate Respondent's proposals. Respondent, rather than bargaining further, claimed an impasse existed, and without affording the Union adequate time to bargain, unilaterally instituted its January 14 proposals.

The facts establish that although Respondent had several months to prepare for collective bargaining, it was totally unprepared to submit any wage or language proposal on December 3, the initial bargaining session, although the contract was to expire on December 8. It was the Union who agreed to a 1-month extension. On December 16, the date of the second meeting, Respondent was similarly unprepared to submit any economic offer that could be incorporated into an agreement. Respondent only proposed that it wanted to reduce wages by 24 percent and benefits by 12 percent. There was no specific wage structure for the then present job classifications nor what benefits would be cut and by how much. According to Burtch, Respondent did not even begin to prepare figures and proposed job classifications until after the December 16 meeting. Then, although the parties met again



on January 6, 2 days before the extended agreement was set to expire, Respondent still had not submitted a legitimate wage offer. It was not until January 7, a day before the extended agreement was set to expire, that Respondent submitted its initial wage offer and job classification structure, containing 16 job classifications. During the course of this meeting Respondent then submitted what was supposed to be a new wage offer compressed into a new 10-job classification structure. The only problem was that Respondent deliberately withheld from the Union the proposed wages from the written proposal submitted to the Union although its own copy contained such proposed wages. Thus, on January 8, the date the extended contract was to expire the Union did not have a wage offer to consider. On the morning of January 8, Respondent first submitted its proposed wages that corresponded to its job classification structure submitted to the Union on January 7. And, when the Union asked that the contract be extended, Respondent refused. I find Respondent's delay in submitting its wage proposals deliberate, and part of its overall scheme to frustrate bargaining and to rid itself of the Union. I further find such tactic to be evidence of bad faith. The Board has held that delaying tactics are evidence of bad-faith table bargaining. *Atlantic Hilton & Tower*, 271 NLRB 1600 (1984); *Professional Eye Care*, 289 NLRB 1376 (1988).

The evidence further establishes that throughout the entire course of negotiations Respondent insisted on wage cuts of between 22 to 26 percent for the stated reason that based on wage surveys which they conducted, they were convinced that such substantial cuts were necessary for Respondent to be competitive in the industry. The Union repeatedly challenged Respondent's contention and requested Respondent furnish them with copies, or access to such surveys. Respondent repeatedly refused to do so. While an employer can use its economic strength to seek legitimate business goals, its failure to defend them or explain their basis suggests that the employer's intention is punitive, rather than economic. *Hudson Chemical Co.*, 258 NLRB 152, 155 (1981).

The Board has long held that a failure to provide economic justification for a regressive bargaining position is an indicia of bad faith. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Metlox Mfg. Co.*, 153 NLRB 1388, 1394 (1965). *Pertec Computer*, 284 NLRB 810 (1987).

In *Coast Engraving Co.*, 282 NLRB 1236 (1987), the Board rejected an employer's defense of hard bargaining, in part because the employer proposed substantial economic decreases in the terms and conditions of employment without offering specific business justification. See also *Pertec Computer*, above.

I find that Respondent's refusal to supply to the Union the wage surveys it allegedly used to justify its severe wage reduction proposals is evidence of Respondent's bad-faith bargaining.

The evidence also establishes that Respondent after initially proposing an overall wage cut of 24 percent on December 16, proposed a regressive wage cut of 26 percent on January 7, the day before the extended contract was to expire. Moreover, such regressive proposal was made at a time when the Union was being flexible. The Union had reduced its initial wage demand from an 8-percent increase to a 6-percent increase to a wage freeze on January 7. Thus while the Union was reducing its wage demands, Respondent was

increasing its demands for a wage cut. I find such regressive proposal, and particularly the timing of such proposal to evidence bad-faith bargaining by Respondent. See *Coast Engraving*, supra; *Metal Parts Co.*, 252 NLRB 205 (1980).

The parties met again on January 8, the date of the extended contract expiration. At this time Respondent presented to the Union the wage rates to its new 10-job classification proposal submitted to the Union on January 7, with such wages *deliberately withheld*. When the Union requested a contract extension so that it could evaluate Respondent's proposal and make a counterproposal, Respondent refused. The parties next met on January 14. At this time Respondent submitted a different language and economic proposal. On January 16, without giving the Union additional time to evaluate Respondent's proposal and formulate counterproposals, Respondent notified the Union by telegram that if the Union did not accept Respondent's final proposal in full by January 20 it would implement its January 14 proposals. It should be noted that throughout the negotiations, the Union had shown flexibility and movement. It had agreed to a wage freeze and indicated it would consider wage cuts if Respondent would provide the Union with its wage surveys or other information Respondent claimed supported its alleged need for such proposed drastic economic cuts. The Union had also agreed to a number of additional language proposals they had originally opposed. On January 20, Respondent implemented its January 14 proposals. The Board has held that a party is entitled to a reasonable time to evaluate and respond to the other parties proposals. *Milwaukee Terminal Services*, 282 NLRB 637 (1987). I conclude Respondent failed to provide the Union sufficient time to evaluate its January 8 and 14 proposals and that such failure is evidence of bad-faith bargaining.

I further find Respondent's telegram on January 16 declaring an impasse and its implementation of its January 14 proposal to be further evidence of Respondent's bad-faith bargaining. Respondent was not prepared to intelligently bargain with the Union before January 6. It was not until January 7 that it submitted its first comprehensive wage proposal. Yet 1 week later, and notwithstanding the Union's flexibility, described above, Respondent declared an impasse.

The Board in *Stephenson-Yost Steel*, 294 NLRB 395 (1989), found that the employer's declaration of impasse and implementation of its final offer after only two negotiations, 10 days apart was evidence of its true bargaining objective of declaring an impasse for the purpose of implementing its own terms, rather than reach an agreement with the Union. In *Stephenson-Yost Steel*, as in the instant case, the union had demonstrated flexibility by agreement on some proposals, movement on other proposals and statements that they were flexible. In *Stephenson-Yost Steel*, the Board stated that "Respondent returned to the bargaining table after the break and, without further bargaining, presented a written document containing the terms of its 'final offer' . . . an offer which it had every reason to believe, in light of the Union's bargaining position until then, would be rejected by the unit employees." See also in this regard *Hotel Roanoke*, 293 NLRB 182 (1989).

I find, as the Board found in *Stephenson-Yost Steel*, that Respondent's January 16 declaration of impasse and implementation of its January 14 offer is evidence of Respondent's

bad-faith bargaining and part of its plan to rid itself of the Union.

Respondent's entire course of conduct during the final April 30 bargaining session evidenced bad-faith table bargaining. Initially, Burtch was extremely reluctant to agree to this meeting. He had to travel from his office in Virginia to Watertown, New York. However, when the meeting took place, the Union's chief negotiator, Corcoran, told Respondent the Union was prepared to be "flexible" and "malleable" and as proof of this position, the Union agreed to Respondent's proposals on seniority, holidays, vacations, health care deductibles and copayments, and job reclassifications. In addition the Union proposed to accept a 10-percent wage cut. Notwithstanding such major concessions Burtch flipantly stated he had "wasted his time" coming to Watertown, and demanded nothing less than full capitulation to Respondent's January 14 proposals. The Board has held that statements which disparage the bargaining process support an inference of bad-faith bargaining. *White-Evans Service Co.*, 285 NLRB 81, 86 (1989). In that case Respondent's negotiator stated that further negotiations were a "waste of time." I conclude Burtch's statement in the face of substantial union concessions and its stated position to be "flexible" and "malleable" establish that Respondent had no real intention of bargaining with the Union on April 30, rather it was insisting on total capitulation. Thus I find Respondent's entire course of conduct during the April 30 session evidenced bad-faith bargaining.

The facts of this case establish that sometime in late January or early February, after Respondent implemented its January 14 proposals, Respondent set up a \$10,000 fund through a local Lowville church for the purpose of assisting its employees who had experienced financial difficulties as a result of those wage and economic cuts. Further, sometime in June through September, following its withdrawal of recognition, Respondent made various unilateral changes which provided substantial economic benefits, which had been sought by the Union at the bargaining table. In this respect, Respondent sharply increased its employees' wages by providing a monthly production bonus which employees could easily earn with routine production. Respondent also provided life insurance, a 40(k) plan, sick leave, severance pay, pension plan, safety glasses and shoes, and other benefits described above.

I find that Respondent, by providing such benefits directly to employees at a time when it took the position with the Union, during bargaining, that substantial cuts were necessary to be competitive took inconsistent actions which evidenced bad-faith table bargaining. Thus, Respondent's actions away from the bargaining table establish that its bargaining position, at the bargaining table, that severe economic cuts were necessary in order to be competitive was untruthful, and such position was taken only to avoid reaching an agreement with the Union. The benefits provided directly to employees could have been provided at the bargaining table. The Board has held that such conduct away from the bargaining table can be analyzed in order to shed light on the employer's true motives at the bargaining table. *Hedaya Bros., Inc.*, 277 NLRB 942 (1985).

Based on Respondent's proposals, and its actions and conduct at the bargaining table alone, I conclude Respondent bargained in bad faith with no intention of reaching an agree-

ment with the Union. This conclusion is strongly reinforced by Respondent's conduct away from the bargaining table described above. In view of Respondent's bad-faith bargaining I find that no impasse can be reached. *Oak Rubber Co.*, 277 NLRB 1323 (1985).

However, even if it were ultimately determined that Respondent had not bargained in bad faith I would still find no impasse had been reached. The Board has defined an impasse as follows:

A genuine impasse in negotiations exist when, despite the parties' best efforts to achieve an agreement, neither party is willing to move from its position. Until the collective bargaining process has been exhausted, no impasse can occur.

*Oak Rubber Co.*, supra at 1324 (citations omitted). In *Taft Broadcasting Co.*, 163 NLRB 475 (1967), enfd. 395 F.2d 622 (D.C. Cir. 1968), the Board stated that the bargaining history, good faith of the parties in negotiations, importance of the issues separating the parties, and contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse is reached. In addition, the burden of proof to show an impasse is on the party claiming the impasse. *Baytown Sun*, 255 NLRB 154, 157 (1981).

In the instant case, the record clearly shows impasse was never reached between the parties, and at no time was collective bargaining sufficiently exhausted.

The Union at all negotiations indicated its willingness to be flexible. This was stated by the union negotiators throughout all negotiations and evidenced by their actions. With respect to wages alone the Union moved from an initial wage demand of an 8-percent increase the first year to a 6-percent increase to a wage freeze and ultimately on April 30, to a 10-percent wage cut and indicated its continued position to be flexible even at this time. During the same period Respondent proposed a 24-percent wage cut, then a regressive 26-percent cut and thereafter modified its demand for a huge cut only infinitesimally. Rather the evidence establishes that Respondent was rushing to declare impasse, orally stating the parties were at impasse on January 8, only 2 days after it made its first complete written proposal.

I find Respondent's declaration of impasse on January 15 a week following its first written proposal and in view of the Union's continued flexibility to be premature. *Stephenson-Yost*, and *Hotel Roanoke*, supra.

The evidence established that on May 28, following receipt of an employee petition signed by a majority of employees Respondent withdrew recognition from the Union. In view of Respondent's bad-faith bargaining, described above, which I find to be violative of Section 8(a)(5) I find Respondent's withdrawal of recognition similarly unlawful and violative of Section 8(a)(5). *Engineering Control Systems; Prentice-Hall*, supra.

Following the withdrawal of recognition Respondent thereafter made various unilateral changes affecting the bargaining unit employees. These changes implemented a series of benefits enjoyed by Respondent's salaried personnel and described in Respondent's salaried personnel manual<sup>9</sup> which were not

<sup>9</sup>G.C. Exh. 9.

previously is a violation of Section 8(a)(5). *Engineering Control Systems*, supra.

The evidence established that Respondent established a grievance or a department representative committee among the employees in the bargaining unit. The committee was designed to deal with all problems arising in the plant that would have normally been subject to the Union's grievance-arbitration procedures. Respondent's establishment of these department committees and its bargaining with the committees over terms and conditions of employment constitutes direct dealing in violation of Section 8(a)(5). *Mooreville IGA Food Liner*, 284 NLRB 1055 (1987); *Chester Valley, Inc.*, 251 NLRB 1455 (1980).

The evidence further established that on August 6, 1987, the Union made a written request of Respondent for records which would show the terms of Respondent's pension plan being applied to bargaining unit employees, the employees covered by the plan and the amounts contributed on behalf of each employee. Respondent replied in part to the Union's request. However Respondent failed to provide the Union with a copy of the trust agreement, a copy of the plan, a statement of the current accrued benefits, the dates and the amount of contributions made on behalf of each employee. I find Respondent further violated Section 8(a)(5) by its failure to supply the Union with such information. *Harow Servo Controls*, 250 NLRB 958 (1980); *Vore Cinema Corp.*, 254 NLRB 188 (1981).

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the exclusive collective-bargaining representative of the following unit of Respondent's employees:

All hourly paid plant production and maintenance employees including janitors at Respondent's plants located at Trinity Avenue, South State Street and Utica Blvd., all in Lowville, excluding office and clerical employees, technicians, guards (firemen-watchmen), foremen and all other supervisors as defined in the Act.

4. Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act by (a) engaging in bad-faith table bargaining with the Union, (b) the withdrawal of recognition on May 28, 1987, (c) by unilaterally changing the terms and conditions of employment of the employees represented by the Union in the unit described above, (d) by encouraging and forming employee grievance committees, and (e) by failing to supply the Union with information supporting Respondent's economic position concerning its bargaining demands and with pension plan information applicable to employees in the unit described above.

5. The unfair labor practices of Respondent as described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found Respondent has engaged in certain unfair labor practices, I shall recommend it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

Respondent shall be required to resume recognition of the Union in the unit described above. Respondent shall be required to bargain with the Union in good faith as the exclusive representative of the unit of employees described above concerning terms and conditions of employment, and if an agreement is reached embody such understanding in a signed agreement. Respondent shall be required to restore the terms and conditions of employment which were in effect under the collective-bargaining agreement with the Union which expired on January 8, 1987, and make whole the employees for any loss of wages or other benefits suffered by Respondent's implementation of its January 14, 1987 proposals or any changes therein in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977), and make contributions to any fund established by the parties' collective-bargaining agreement in existence as of January 8, 1987, to which Respondent would have made but for its unilateral actions described above,<sup>10</sup> Respondent shall be required to cease dealing with any employee grievance committee and deal with the Union exclusively pursuant to the terms of the grievance and arbitration provisions of the January 8, 1987 agreement. Respondent shall furnish the Union, on request, with any information, wage surveys, etc., it uses to formulate collective-bargaining proposals in connection with any collective-bargaining negotiations engaged in with the Union and to furnish, on request, any pension plan information regarding the terms and provisions of the plan and the contributions made by Respondent on behalf of each unit employee.

[Recommended Order omitted from publication.]

<sup>10</sup>In ordering the Respondent to make whole the employees for losses suffered by reason of its implementing new pension, health, and insurance plans, I note that the record is unclear whether the new plans were substitutes for preexisting benefit plans and whether any losses were incurred by this conduct. I shall order that the employees be made whole for such losses, if any, they may have incurred, and that the Respondent make the contributions to benefit trust funds, if any, which would have been made but for the Respondent's unilateral institution of pension, health, and insurance plans. Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory state of a proceeding for the addition of interest at a fixed rate on unlawfully withheld payments. It leaves to the compliance state the questions of whether the Respondent must pay any additional amounts into benefit funds in order to satisfy our "make whole" remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. *Merryweather Optical Co.*, 240 NLRB 1213 (1979). See *Manhattan Eye, Ear & Throat Hospital*, 280 NLRB 113 fn. 8 (1986).